IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-811

REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Petitioners,

v.

ALLAN BAKKE,
Respondent.

On Appeal from the Supreme Court of California

BRIEF OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, AMICUS CURIAE

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BRIEF OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, AMICUS CURIAE

The American Association of University Professors appears *amicus curiae,* with consent of all parties.

INTEREST OF AMICUS CURIAE

The American Association of University Professors (AAUP) was founded in 1915 to advance the standards, ideals and welfare of teachers and research scholars in universities and colleges. Since its inception the Association has formulated *Statements,* frequently in concert with other national organizations, intended to

establish minimum standards of institutional practice in both public and privately operated institutions of higher education. Among these is the *Statement on Government of Colleges and Universities* drafted jointly with the American Council on Education and the Association of Governing Boards of Universities and Colleges. To a large extent the standards of the Association are considered normative in American higher education. This Court has, in the past, acknowledged AAUP standards in determining the reach of the Constitution on campus. *See Roemer* v. *Board of Public Works*, — U.S. —, 96 S. Ct. 2337, 2349 (1976). *Cf. Board of Regents* v. *Roth*, 408 U.S. 564, 579 n.17 (1972).

The tripartite *Statement on Government* assigns to the institution's faculty a major role in setting educational policy; as a matter of common practice, faculty committees are often intimately involved in the admissions process, especially in graduate and professional education. The instant case concerns the constitutional limits upon an institution's ability to consider the race of an applicant in its admissions procedure; thus the decision may well affect a faculty's ability to select a class in order to achieve a degree of student diversity which, in its educational judgment, it believes necessary to the institution's objective of providing an optimal education for all the students selected. Accordingly, the Association intends to apprise the Court of the educational grounds upon which race may properly be considered as a factor in the admissions procedure.

SUMMARY OF ARGUMENT

Many institutions of higher education, especially graduate and professional schools, receive more applications from candidates who are qualified, *i.e.* able to successfully complete the course of study, than the institution can admit. While an institution may decide to select wholly upon a rank order based upon measurable traits, it may also decide that such reliance would yield too homogeneous a class. An institution may validly conclude that the quality of the educational experience for all students is enhanced by considering as one factor in the admission process the racial diversity of the class selected. Accordingly, the AAUP will suggest that a faculty, in exercising its experienced judgment, may identify a nontrivial number of qualified minority students for admission to assure the optimal educational experience for the entire class selected.

ARGUMENT

I. Significant Educational Goals Are Served by Considering Diversity as a Factor in Selecting a Student Class.

Colleges and professional schools attempt to admit applicants whom they believe will become successful students and good alumni—for professional schools the latter usually means able practitioners. C. Jencks & D. Riesman, THE ACADEMIC REVOLUTION 254-255 (1968). To the extent measurable traits have a close relationship to the likely degree of success in study, consideration of them in the admissions process is useful. There are, however, well recognized deficiencies in relying wholly upon measurable traits. *See generally* Fishman, *Some Social-Psychological Theory for Selecting and Guiding College Students*, in N. Sanford, *ed.*, THE AMERICAN COLLEGE 666 (1962). *See also* Miller, *Personality Differences and Student Survival in Law School*, 19 J. Legal Educ. 460 (1967). As an early self study of the University of Chicago Law School noted:

> If it should be decided that the opportunity to study law will be provided only for that selected group whose measured traits virtually assure the successful pursuit of this course [of study], it is understood that the less promising group who are excluded will include some who might succeed if similar opportunities were provided for them. Eagleton & Henry, *The Admission and Retention of Students in the Law School,* in F. Reeves and J. Russell, ADMISSION AND RETENTION OF UNIVERSITY STUDENTS, Part V at 293-294 (1933).

Thus, at the undergraduate level a recent study of over 100,000 students over a four-year period concluded that

> a substantial number of students who show college potential on the basis of traditional admission criteria drop out because of grades. In addition, a much smaller but significant number of students who do *not* exhibit the potential for academic achievement get high grades and consequently complete their studies. A. Astin, PREVENTING STUDENTS FROM DROPPING OUT 101 (1975) (emphasis in original).

Similarly, in the health professions while the drop-out rate for seemingly higher risk admittees may be greater than for admittees selected wholly upon traditional criteria, the rate of successful completion is nevertheless substantial. *See, e.g.,* Diekema, *The Medical Opportunities Program Revisited: An Assessment of Admission, Enrollment and Retention of Minority Students in Health Professional Schools,* 50 College and University 60 (1974).

Moreover, some institutions, especially professional schools, receive more applications from candidates po-

tentially capable of successfully completing the program, *i.e.* applicants who experienced educational judgment would conclude are admissible, than they have room to admit. As Princeton's Director of Admissions noted over a decade ago, "Average test scores for today's *applicant group* are higher than the average scores for any *class* enrolled prior to 1958." Dunham, *A Look at Princeton Admissions,* 65 Princeton Alumni Weekly No. 13 (January 19, 1965) (emphasis in original). Inasmuch as measurable traits—*i.e.* the traditional criteria of grades, standing in class and test scores—supply only a partial solution, it is appropriate that the faculty be free to use other educationally relevant factors in choosing a smaller number from all qualified applicants.

One policy widely accepted in the academic community is that an institution may seek a greater diversity of students than would be produced by adhering entirely to a rank order based upon measurable traits. As E. Alden Dunham explains:

> We look carefully at an applicant who has had an especially rough time of it and has managed to land on his feet. We want students with unusual talents and interests. . . . Concern for overall balance within an entering class and for a significant mixture within the undergraduate body as a whole is another way of stating Princeton's interest in diversity among its students. *Id.*

As a result

> some are turned away whose main strength is academic in order to take others who appear less able scholastically but who are desirable on other grounds. On the other hand, some applicants who are relatively strong on nonacademic grounds have

> to be denied admission in order to take others whose academic potential is their greatest asset. . . . Behind such decisions lie the goals of diversity and balance. . . . *Id.*

Diversity has a significant impact upon both in-class and assigned academic work as well as on the "student culture" of the institution, all of which affect the quality of the educational experience. First, higher education is not conducted on a purely dyadic basis between student and teacher in which the presence and participation of other students play little or no role. *See, e.g.,* H. Becker, B. Geer, E. Hughes & A. Strauss, BOYS IN WHITE: STUDENT CULTURE IN MEDICAL SCHOOL 180-181 (1961). *See generally* Katz, *Personality and Interpersonal Relations in the College Classroom* in N. Sanford, *ed.,* THE AMERICAN COLLEGE 365 (1962). Instruction is frequently conducted in class discussion, the success of which turns upon the active participation of students. *See generally* McKeachie, *Procedures and Techniques of Teaching,* in N. Sanford, *ed.,* THE AMERICAN COLLEGE 312 (1962). In professional schools, such as law and medicine, the method of student interrogation and case explication is frequently employed as part of the group learning process. *See generally* Thorne, *Professional Education in Medicine,* in E. Hughes, *ed.,* EDUCATION FOR THE PROFESSION OF MEDICINE, LAW, THEOLOGY, AND SOCIAL WELFARE 17 (1973), and Thorne, *Professional Education in Law, id.* at 101. Moreover, in laboratory and clinical work in both undergraduate and graduate programs, students are frequently assigned as work groups or teams; as students perform educational tasks on a collective basis, learning becomes the product of collective problem-solving.

Accordingly, it is important to stress that behavior —and learning—in groups is very much the product of the interaction with other members of the group; consequently, the composition of the group plays an important role in the success of the process. *See generally* McKeachie, *Research on Teaching at the College and University Level,* in N. Gage, *ed.,* HANDBOOK OF RESEARCH ON TEACHING 1118, 1143-1144 (1963). Thus a policy which selects from qualified applicants in order to assure the diversity of the student body is designed to benefit the entire class by greatly expanding the range of experience available to the group, especially by bringing the rather special experiences of members of otherwise significantly under-represented groups to bear in the give-and-take of class discussion and other collaborative academic work. *Cf.* Merton, *The Perspectives of Insiders and Outsiders,* in R. Merton, THE SOCIOLOGY OF SCIENCE 99, 121 (1973) (N. Storer, *ed.*).

Second and closely related is the somewhat paradoxical teaching problem that "the individual tends to adopt attitudes corresponding to those held by the majority of the group." McKeachie, *Individual Conformity to Attitudes of Classroom Groups,* 49 J. Abnormal & Social Psych. 282 (1954). But, "If the discussion is one in which the group member hears many divergent attitudes expressed and if these diversions are tolerated by the group, the forces toward conformity will be weakened." *Id.* at 287. It again follows that selecting in part in order to produce a racially heterogeneous class should lessen the impulse to conformity while simultaneously expanding the diversity of personal experience drawn upon for class discussion.

Perhaps even more significant, education is not limited to the classroom, clinic or laboratory; it occurs in the very complex process of interaction within the "student culture" of the institution. *See generally* N. Sanford, *ed.*, THE AMERICAN COLLEGE, Part IV ("Student Society and Student Culture") (1962).[1] The role of the "student culture" is similarly significant in professional education. As one investigator noted of legal instruction, the behavior of classmates is a "salient feature of the first-year situation. One's peer group, like the faculty, is in a position to exert considerable influence upon the way a student performs." Patton, *The Student, the Situation, and Performance During the First Year of Law School*, 21 J. Legal Educ. 10, 39 (1968).

There is little doubt that for a subject, such as law, which must confront every pressing social issue, the participation of students of varied social and ethnic backgrounds provides vital additional perspectives and thus a fuller education than were the class socially and ethnically homogeneous. But the diversity principle is applicable to the "student culture" of scientific, medical and other advanced education as well. In medical education, for example, the reliance of medical schools upon the indigent as clinical "teaching material" establishes an institutional setting which reinforces the

[1] For example, the special admission of foreign students at the undergraduate level has long been thought necessary to broaden the educational experience of American students. *See generally* H. Wilson, AMERICAN COLLEGE LIFE AS EDUCATION IN WORLD OUTLOOK 91 (1956). Indeed, a substantial number of undergraduates indicate as a "very important" reason for going to college the desire to meet new and interesting people. A. Astin, M. King & G. Richardson, THE AMERICAN FRESHMEN: NATIONAL NORMS FOR FALL 1976 at 50, 64, 78.

pre-existing class biases of an overwhelmingly white, middle-class medical student body. H. Becker, B. Geer, E. Hughes & A. Strauss, BOYS IN WHITE: STUDENT CULTURE IN MEDICAL SCHOOLS Ch. 16 ("Students and Patients") (1961). However, as one commentator observed, "Physicians recruited from disadvantaged communities are likely to bring to their training a different set of values and assumptions, having more sympathy, knowledge, and ability to communicate with patients from minority subcultures." Thorne, *Professional Education in Medicine*, in E. Hughes, *ed.*, EDUCATION FOR THE PROFESSIONS OF MEDICINE, LAW, THEOLOGY AND SOCIAL WELFARE 17, 53 (1973). *Cf.* Amir, *Contact Hypothesis in Ethnic Relations*, 71 Psych. Bull. 319 (1969) (stressing the structure and setting of inter-ethnic contacts as affecting racial and ethnic attitudes). The introduction into the student culture of students having that background may play an important role in the process of professional socialization of the entire student class, *i.e.* in the production of a group of physicians who may be more understanding of—and compassionate toward—patients.

Professional education generally has become so highly technical that sight may inadvertently be lost of the larger societal context in which the profession is practiced precisely at a time when a full appreciation of that context is what is demanded of the profession. *See* R. Hofstadter, *The Development of Higher Education in America*, in R. Hofstadter & C. Hardy, THE DEVELPMENT AND SCOPE OF HIGHER EDUCATION IN AMERICA 3, 86-88 (1952). As a result, interaction in a structured educational environment with other students of varied ethnic backgrounds may assume added significance in the education of a socially aware pro-

fession. Inasmuch as the admissions process determines the composition of the student population, it influences very heavily the kind of education the students receive.

II. The Consideration of Race In Order to Achieve an Educationally Sound Student Diversity Does Not Contravene the Fourteenth Amendment.

The consideration of race in the admissions process in higher and professional education may be predicated upon two grounds: the need to afford some preferential treatment to historically disadvantaged nonwhites generally, or, the particularized application of professional judgment about the nature of the educational process. *Cf. United Jewish Organization* v. *Carey,* —— U.S. ——, 45 U.S.L.W. 4221 (U.S. March 1, 1977) (Brennan, J. concurring). The AAUP has not developed a position with respect to the former ground and thus shall not address it here. The latter ground, however, finds considerable support in the practice of the academic community and in the standards of the AAUP; accordingly, the AAUP believes it sufficiently weighty to address the constitutional aspects of the instant case from that perspective.

As Section I, *supra,* pointed out, achieving a satisfactory degree of racial or ethnic diversity is relevant to providing an optimal educational experience for the entire student body. This is not because race is an efficient surrogate for personal traits or experience which might also be educationally relevant. Race itself has a powerful social and cultural significance in American society. *See* R. K. Merton's most insightful discussion, *The Perspectives of Insiders and Outsiders,* in R. Merton, THE SOCIOLOGY OF SCIENCE 99 (1973) (N.

Storer, *ed.*). *See also* Duncan, *Minority Students,* in J. Katz & R. Hartnett, *eds.,* SCHOLARS IN THE MAKING 227 (1976) and Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role,* 42 U. Chi. L. Rev. 653, 684-685 (1975). Moreover, members of a racial or ethnic group are not fungible; their perspectives and attitudes, although of necessity shaped in part by the fact of minority group membership, vary across a wide spectrum. *Id.* Thus it is of benefit to the entire class to have that very diversity reflected in class discussion and in the student culture of the institution. *Id. See also* O'Neil, *Racial Preference in Higher Education: The Larger Context,* 60 U. Va. L. Rev. 925, 949 (1974).

Inasmuch as the selection of a sufficient number of qualified minority group members to assure a satisfactory degree of racial or ethnic diversity has been shown to be relevant to an optimal education for the entire class selected, the AAUP is at a loss to understand how the Fourteenth Amendment would prohibit selection for that purpose. In *Sweatt* v. *Painter,* 339 U.S. 629 (1950), the Court observed that

> The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in a vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned. *Id.* at 634.

The exclusion of "members of racial groups which number 85% of the population of the State" from serious consideration for admission to law school involved in that case was held to deny a legal education

substantially equal to that provided by the heretofore all-white law school. *Id.* Affirmance of the decision of the California Supreme Court in the instant case would deny an institution the ability to select from among qualified applicants in order to assure, in part, the very benefits of diversity to which this Court adverted above.

Further, in *Swann* v. *Charlotte-Mecklenberg Board of Education,* 402 U.S. 1 (1971), this Court noted the "broad discretionary powers" of local public school authorities to consider race in school assignment "in order to prepare students to live in a pluralistic society." *Id.* at 16. The Court's observation is premised upon the presumptive soundness of an educational judgment when it is intended to enhance the social development of all students. As Section I, *supra,* has shown, the race of an applicant in higher education is considered for reasons having perhaps more sharply focused educational purposes than the general purpose of preparation for a pluralistic society.

Relatedly, composing a student class so as to provide the fullest education for those selected presents difficult and subtle choices for an institution and its faculty. The policy issues underlying selection criteria are studied and debated at length. The actual selection process often consumes thousands of faculty man-hours in reading and comparing the files compiled about applicants, in personal interviews and in committee meetings. Thus the selection of an applicant is the result of open discussion and collective effort by the professional group which, presumptively, should be expected to exercise an experienced judgment about the optimal composition of the class selected.

This is not to suggest that the academic community has *carte blanche* in its administration of the admissions process or that its discretion in that process cannot be abused.[2] It is to assert, rather, that if the application of traditional numerical indicators would result in the absence of ethnic minorities, or their presence only in very small numbers, it is not an abuse of discretion for the institution expressly to identify a nontrivial number of qualified minority students to assure an educationally sound degree of diversity, as the University of California has done in the instant case. (On the contrary, were a number identified so small as to constitute mere tokenism or so large as to be inconsistent with the achievement of true diversity, then a question of abuse might fairly be raised.) To be sure, the identification of an educationally significant number, to assure the *summum bonum* of the best education for all those selected, would have the ancillary effect of denying other qualified non-minority applicants the opportunity for an education at that institution. That ancillary effect, however, is indistinguishable from the denial of an educational opportunity to applicants because of other considerations of diversity premised as well on the goal of providing the best education. For example, were the institution to conclude that the selection of a nontrivial number of

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[2] The institutional biases of an earlier period against the admission of blacks and Jews constituted an abuse of the admission process at least in part because such prejudices prevented consideration of qualified applicants who were racially or religiously different from the vast majority of the class admitted. Those practices are inconsistent with the diversity principle and the educational grounds underpinning it; thus it should be noted that such practices were never defended on educational grounds. *See* Hutchins, *Report of the President's Commission on Higher Education,* 29 Educ. Record 107 (1948).

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qualified foreign students enriches the education of all students, some qualified native American applicants would be denied the opportunity of studying at that institution to afford those who are admitted a better education. Inasmuch as consideration of both race and foreign residence is relevant to selecting a class that will have the fullest educational experience, the AAUP would ask why the latter would be plainly permitted but the former prohibited by the Fourteenth Amendment.

CONCLUSION

The salient issue in the instant case is whether an institution of higher education may consider race at all as a factor in selecting a student class from a group of qualified applicants. The AAUP has shown that for reasons valid to the processes of higher and professional education, the entire class and, ultimately, society may benefit from having a diversity of students selected. While this educationally desirable principle does not give an institution *carte blanche* to choose from among applicants, it does argue that race may properly be considered as a factor when it is relied upon for such a purpose and when the participation of the institution's faculty serves partially to assure that an experienced educational judgment has been made about the best composition of students for the kind of education the institution provides. It follows, contrary to the decision of the California Supreme Court, that an institution may, in appropriate circumstances, identify a nontrivial number of qualified minority group applicants for admission in order to produce the best educational experience for all the students selected.

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